In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-422

ANTONIO BENEVENTO, ET AL., PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The petitioners were federal employees working as masters, mates, and engineers on fishing research vessels of the Bureau of Commercial Fisheries of the Department of the Interior (Pet. App. A 2-3, 13; Pet. App. B 1, 11). They brought these actions in the Court of Claims in 1966 and 1967 seeking overtime pay for work at sea (Pet. App. A 13; Pet. App. B 11). The applicable statute, section 202(8) of the Classification Act of 1949, as amended, provides that the compensation of

> officers and members of crews of vessels * * * shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry. [5 U.S.C. 1082(8) (1964), now 5 U.S.C. 5342(a).]

Pursuant to this statute, the regional Bureau of Commercial Fisheries' Wage Board annually determined, and the regional director approved, wage rates for the officers and crews of two vessels, the *Delaware* and the *Albatross IV* (Pet. App. A 22-23).[1]

Until December, 1965, the wage rates for time spent at sea had consistently been based upon a comparison with the commercial fishing industry (Pet. App. A 23-33; Pet. App. B 21-30). The rates did not include any overtime pay for work in excess of eight hours per weekday or for work on weekends and holidays, because the commercial fishing industry did not pay overtime (Pet. App. A 31).

Since December 17, 1965, engineers on the two vessels have been compensated on the basis of rates negotiated with their exclusive representative (Pet. App. A 32). The 1965 agreement provided for overtime pay to engineers in only one set of circumstances (Pet. App. A 33). Similarly negotiated wage rates for the masters and mates became effective on No-

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[1] Although some petitioners served on other vessels, it was agreed below that the determination of the liability of the government with respect to claims based on employment on these two vessels would control the claims of the other petitioners based on their similar employment on other vessels (Pet. App. A 13).

vember 5, 1967 (Pet. App. B 30). This 1967 agreement generally provided for overtime pay to masters and mates (Pet. App. B 30).

On June 16, 1972, the Court of Claims, adopting the opinions of its commissioner following a trial, upheld the challenged wage rates. The court rejected petitioners' contention that the Wage Board had unlawfully utilized the commercial fishing industry, instead of the commercial off-shore, dry cargo and tanker industry, as "the maritime industry" within the meaning of section 202(8). The court also rejected petitioners' claim that the failure to pay overtime violated 5 U.S.C. 5544(a) and 6102. The court held these statutory provisions inapplicable to employees on vessels of the Department of Interior.

2. These cases do not warrant further review. The question whether employees on government fishing research vessels are entitled to overtime pay affects only a small class of persons, and involves no important question of federal law.[2] In any event, the Court of Claims decisions are correct.

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[2] Moreover, as the Court of Claims held (Pet. App. A 2, n. 2; Pet. App. B 1, n. 2) and as petitioners apparently do not contest, the overtime pay dispute pertains only to the period prior to negotiated agreements, *i.e.*, before 1965 for engineers and before 1967 for masters and mates. The present importance of this controversy is further reduced by the Court of Claims six-year statute of limitations, 28 U.S.C. 2501, which bars further overtime pay actions by engineers and which leaves open only about one year of the disputed period for masters and mates. See *Daniels* v. *United States*, 407 F. 2d 1345 (Ct. Cl.).

The holdings that the Wage Board properly utilized the wage rates of the commercial fishing industry to determine petitioners' compensation are supported by expert testimony that the maritime industry may be understood to include the commercial fishing industry (Pet. App. A 40; Pet. App. B 38). Petitioners contend that the legislative history of 5 U.S.C. 6305(c), enacted in 1966, demonstrates that the fishing industry is not part of the maritime industry (Pet. 7-10). The Court of Claims, however, correctly concluded that it is "far from clear" that the legislative report upon which petitioners rely, H. Rep. No. 2200, 89th Cong., 2d Sess., supports their argument, and in any event, that that legislative history has little significance because it does not pertain to the statute in issue, but to a provision enacted at a different time to deal with different matters (Pet. App. A 7-8; Pet. App. B 5-6). Petitioners' reliance upon 5 U.S.C. 5544 and 6102 (Pet. 10) is also misplaced, since vessel employees of the Department of the Interior are specifically exempt from those provisions (see 5 U.S.C. 5541(2)(xii), cf. 6101(a)(1)), as the Court of Claims held (Pet. App. A 11-12; Pet. App. B 10-11).

Finally, there is no merit to petitioners' contention that the Court of Claims relied upon excluded evidence. Part of the finding challenged by petitioners (Pet. 11) reflects testimony admitted without objection (see Tr. 630-631), *i.e.*, that in 1958 the Wage Board chairman considered basing the wage rates in issue upon the earnings of employees on research vessels

of Woods Hole Oceanographic Institution (Pet. App. A 24; Pet. App. B 21). The remaining portion of the challenged finding is that the chairman was told by representatives of the crew of the *Delaware* that their work was not comparable to work aboard Woods Hole vessels and that they did not desire to have their wages based upon a comparison to those vessels. The petitioners moved to strike this testimony "unless the witness states who said what" (Tr. 632). The trial commissioner initially sustained petitioners' objection, but then allowed the witness to specify who had made the statement in question, thereby removing the only basis for petitioners' objection, and the testimony was accepted (Tr. 632-633, 639-640). In any event, no reliance on the challenged finding is necessary to sustain the decision below.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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